Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CITY OF DALLAS,

Petitioner,

v.

PETER T. COLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question that is currently before the Court in *Ours Garage and Wrecker Service v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-419), which is whether 49 U.S.C. § 14501 permits cities to enact safety regulations regarding local tow truck operations, as the Second Circuit and the California Court of Appeals have held, or pre-empts such regulations, as the Fifth, Sixth, Ninth, and Eleventh Circuits have held.

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OPINIONS AND ORDERS BELOW

The per curiam opinion of the court of appeals is not reported.[1] (App. A.) The district court's final judgment is not reported. (App. B.) The district court's memorandum opinion and order is not reported. (App. C.)

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 9, 2001. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Federal Aviation Administration Authorization Act of 1994 ("FAA Authorization Act") amended the Interstate Commerce Act ("ICA") at 49 U.S.C. § 11501(h). The Interstate Commerce Commission Termination Act ("ICC Termination Act") recodified 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c). (App. E.) Section 14501(c) now provides in pertinent part:

> **(c) Motor Carriers of Property.** –
>
> **(1) General rule.** – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> **(2) Matters not covered.** – Paragraph (1) –
>
> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight

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1. For the Court's convenience, "App." refers to an appendix at the end of this petition, and "R." refers to the clerk's record of the proceedings in the U.S. District Court.

> of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> **(B)** does not apply to the transportation of household goods; and
>
> **(C)** does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Section 643.201(a) of the Texas Transportation Code (App. E.) provides:

> In addition to the registration requirements of Subchapter B, a municipality may regulate the operation of a tow truck to the extent allowed by federal law.

City of Dallas ("City") Ordinance No. 24175 re-enacted and codified the City's regulations for vehicle tow services in Chapter 48A of the Dallas City Code. Section 48A-13(a)(7) of the Dallas City Code provides in pertinent part:

> To qualify for a wrecker driver's permit, an applicant must . . . not have been convicted of a crime . . . involving . . . a violation of the Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law . . . for which . . . less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense.

The relevant parts of this ordinance are in the appendix. (App. D.)

STATEMENT OF THE CASE

A. Background

This case presents the same important and recurring public safety issue that is now before the Court in *Ours Garage and Wrecker Service v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-419), which is whether 49 U.S.C. § 14501(c) pre-empts cities from promulgating safety regulations regarding municipal tow truck operations.

In addition to *Ours Garage*, there are two pending petitions before the Court that present the identical issue. *See California ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App. 2001), *review denied* (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336); *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028).

For many years, virtually all major cities in the country have required tow truck companies, their drivers, and their equipment to meet specific safety standards before engaging in the business of towing wrecked and disabled motor vehicles. Cities adopt these standards to protect the public from unsafe towing practices. Tow truck safety regulation and licensing is an area that has traditionally been the province of local governments under our system of democracy.

In 1994-95, Congress enacted the FAA Authorization Act and the ICC Termination Act for the purpose of deregulating the motor carrier industry. Since 1995, five circuit courts, many state courts, and several lower courts have struggled to apply these Acts to local government laws governing tow trucks. After almost seven years of litigation across the country on this issue, the Fifth, Sixth, Ninth, and Eleventh Circuits have held that 49 U.S.C. § 14501(c) preempts cities from enacting safety regulations regarding tow truck operations, while the Second Circuit and the California First District Court of Appeals have held that cities are not pre-empted from adopting such regulations.

B. Statement of Facts

This case concerns one such public safety ordinance. On January 26, 2000, the Dallas City Council passed Ordinance No. 21175, which repealed and re-enacted Chapter 48A of the Dallas City Code. (App. D.) The ordinance governs nonconsensual towing of motor vehicles from private property. Its purpose is to protect "the public interest as it relates to the parking of vehicles on private property and to the removal of those vehicles to vehicle storage facilities without the consent of the vehicle owners or operators." (App. D at 16a.) The ordinance's preamble gives several reasons why the ordinance promotes public safety. (App. D at 14-15a.) The preamble also indicates that the City Council was aware of its limited power to regulate nonconsensual tows under federal law. (App. D at 13a-14a.) The ordinance includes, but is not limited to, licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements. (App. D at 14a.) The ordinance specifically prohibits persons from receiving wrecker driver's permits to tow motor vehicles if they have been convicted of violating the Texas Controlled Substances Act, or a comparable law, that is punishable as a felony, and less than five years have elapsed since the date of release from confinement for the conviction. (App. D at 17a-18a.)

In this case, Peter T. Cole ("Cole") pleaded guilty to delivery of a controlled substance (cocaine), a felony, and was sentenced to ten years in prison in 1994. (R. Vol. 1, p. 219.) He was released from prison and sentenced to ten years of "shock probation" later that year.[2] (R. Vol. 1, p. 219.) Three years later, Cole's probation was revoked and he was sentenced to five years in prison. (R. Vol. 1, p. 219.) He was released from prison on January 5, 1999. (R. Vol. 1, p. 215.)

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2. "Shock probation" describes a trial court's action in suspending further execution of a prison sentence and placing the defendant on community supervision within the first 180 days after a defendant is sentenced. Tex. Code Crim. Proc. Ann. art. 42.12, § 6 (Vernon Supp. 2002).

Little more than a year later, Cole applied for a wrecker driver's permit. (R. Vol. 1, pp. 214-15.) Based on Section 48A-13(a)(7) of the Dallas City Code, city staff denied his application due to his recent confinement for the felony. (R. Vol. 1, pp. 210, 213.) Cole administratively appealed the denial to an assistant city manager, who upheld the denial. (R. Vol. 1, p. 206.) Cole's disqualification under Section 48A-13(a)(7) will end on January 5, 2004, assuming he is not convicted of such a crime between now and then.

C. Proceedings Below

Cole filed this action in state court on July 25, 2000, asserting that Chapter 48A of the City Code was pre-empted by 49 U.S.C. § 14501(c). He further alleged that the City's enforcement of Chapter 48A deprived him of due process of law and equal protection of the law. He sought injunctive and declaratory relief, damages, attorneys' fees, and costs. (R. Vol. 1, pp. 8-20.)

The City denied the allegations, then timely removed this action to the U.S. District Court for the Northern District of Texas on August 8, 2000, because the action concerned matters of which that court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). (R. Vol. 1, pp. 1-7.) The next day, that court heard oral argument on Cole's request for a preliminary injunction. (R. Vol. 2, pp. 1-29.) The court thereafter entered a memorandum opinion and order, which denied Cole's request for a preliminary injunction. (App. C.)

Cole then moved the district court to enter judgment against him and to make findings of fact and conclusions of law. (R. Vol. 1, pp. 154-57.) Cole and the City next stipulated to some basic facts. The district court then entered a final judgment, which was based on the parties' stipulations and the written findings of fact and conclusions of law in the court's memorandum opinion and order. (App. B.) Cole timely appealed to the Fifth Circuit. (R. Vol. 1, pp. 234.)

While Cole's appeal was pending, the Fifth Circuit issued its opinion in *Stucky*. The *Stucky* court acknowledged

"the closeness of the issue and the soundness of the arguments on either side" of "this difficult [pre-emption] issue," but concluded that 49 U.S.C. § 14501(c) pre-empted San Antonio's tow truck ordinance. *Id.*, 260 F.3d at 440, 446. Based on *Stucky*, the Fifth Circuit then vacated the district court's judgment in this action and remanded it to that court. (App. A.) The City timely pursued this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Has Divided the U.S. Courts of Appeals and Other Courts.

1. Four Circuits Have Held Section 14501(c) Pre-empts Cities from Enacting Safety Regulations for Tow Truck Operations.

Four circuit courts have found that Section 14501(c) pre-empts cities from promulgating safety regulations like the one involved in this case. The Eleventh Circuit was the first to address the question. *See R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). In that case, several tow truck companies contested Atlanta's ordinances governing "consensual tows," which are tows "which occur when the owner of the vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541. After determining that the pre-emption provision in Section 14501(c)(1) applied to the ordinances, the court contemplated whether the safety exception in Section 14501(c)(2)(A) rescued them from pre-emption. To determine Congress' intent, it compared the text of Section 14501(c)(2)(A), which provides that the pre-emption provision "shall not restrict the safety regulatory authority of *a State*" with the language in Section 14501(c)(2)(C), which declares that the pre-emption provision "does not apply to the authority of *a State or a political subdivision of a State*" to enforce a law relating to the price of a nonconsensual tow. 49 U.S.C. § 14501(c)(2) (emphasis added).

For four reasons, the court rejected Atlanta's argument that Section 14501(c)(2)(C) allowed it to enact safety regulations when the State of Georgia expressly had delegated its regulatory authority to its cities. First, the court relied on "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Mayer*, 153 F.3d at 545. Second, the court found that its interpretation was consistent with the ICC Termination Act's goal of increasing competition by eliminating burdensome state and local laws. *Id.* at 546. Third, the court did not believe that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), required it to interpret "State" to include a State's political subdivisions in all circumstances because the provision at issue in *Mortier* did not refer to political subdivisions at all. *Mayer*, 153 F.3d at 546-47. Fourth, the court did not believe that its holding that Section 14501(c) pre-empted municipal safety ordinances created an irreconcilable conflict with the pre-emption provisions in 49 U.S.C. §§ 5101-5127, the Hazardous Materials Transportation Authorization Act of 1994 ("HMTA Act"). *Id.* at 547-48.

Almost two years after *Mayer*, the Ninth Circuit held that Section 14501(c) pre-empts cities from promulgating safety regulations. *See Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001). In that case, Santa Ana's tow truck ordinance required permits, regulated operations, and authorized the police to establish a rotational list of companies that provide towing services for vehicle impoundment. *Id.* at 1043. A tow truck operator sued, alleging Section 14501(c) pre-empted the ordinance. Santa Ana responded that the State of California had enacted a statute expressly delegating its authority to regulate to its municipalities. The court disagreed, holding that Section 14501(c) pre-empted Santa Ana's ordinance on three grounds. First, the court relied on the presumption that Congress' omission of the "political subdivision" language in Section 14501(c)(2)(A) indicated its

intent that political subdivisions not enact safety regulations for tow trucks. *Id.* at 1051. Second, the court found that this reading of Section 14501(c) furthered the Act's goal of deregulation. *Id.* Third, the court declared that a contrary reading of that section would "lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Id.* The court went on to find, however, that Santa Ana's rotational list was saved from pre-emption by the municipal-proprietor exception. *Id.* at 1048-50.[3]

The Sixth Circuit has twice concluded that the 49 U.S.C. § 14501(c) pre-empts cities from promulgating safety regulations. *See Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Ours Garage*, 257 F.3d 506. In *Petrey*, Toledo had a two-tier licensing system: a Class A license, which permitted an operator to conduct nonconsensual tows ordered by the police, and a Class B license, which allowed an operator to conduct private and third-party tows. The court upheld the Class A licensing scheme, ruling that it was saved from pre-emption by the municipal-proprietor exception. *Id.* at 559. Giving three justifications, the court found that Section 14501(c) pre-empted the Class B licensing system and struck it down. Like the Eleventh and Ninth Circuits, the court depended on the presumption that the omission of the "political subdivision"

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3. Since *Tocher*, the Ninth Circuit has confronted this issue twice. In the first case, the U.S. District Court for the Northern District of California held three months before the Circuit issued its opinion in *Tocher* that Section 14501(c) did *not* pre-empt San Jose's safety regulations for tow trucks because those regulations were authorized by state law. *See Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000), *aff'd*, No. 00-15926, 2001 WL 1458017 (9th Cir. Nov. 16, 2001) (unpublished). Notwithstanding *Tocher*, the Circuit affirmed *Hott* because the plaintiff had litigated the pre-emption claim in state court and obtained a final judgment on the merits. *Id.* In the second case, the Ninth Circuit applied *Tocher* and reversed the district court. *Syldyld, Inc. v. City of San Jose*, No. 00-15953, 2001 WL 1459523 (9th Cir. Nov. 16, 2001) (unpublished).

language indicated Congress' intent that cities not enact safety regulations for tow trucks. *Id.* at 561. The court similarly found that *Mortier* was inapplicable because the law at issue in that case contained many differences from Section 14501(c). *Petrey*, 246 F.3d at 561-62. In addition, the court believed that the legislative history of the ICC Termination Act indicated that Congress' intent was to promote greater competition in the motor carrier industry by eliminating state economic regulation. *Id.* at 563.

Two months after issuing its opinion in *Petrey*, the Sixth Circuit decided *Ours Garage*. There, it relied completely on *Petrey* when affirming the district court's judgment, which permanently enjoined Columbus from enforcing its ordinance governing consensual towing. *Ours Garage*, 257 F.3d at 507.

The Fifth Circuit is the most recent circuit to have examined the pre-emption issue. In *Stucky*, towing company owners sued the city, challenging ordinances that prohibited tow trucks from removing disabled vehicles from public streets unless ordered to do so by the city, and that awarded all the city's towing business to one company. The court first determined that the ordinances, by prohibiting a company from towing a vehicle with its owner's consent unless the City also ordered it, were not saved from pre-emption by the municipal-proprietor exception because the city's actions were "regulatory in nature." 260 F.3d at 438. For four reasons, the court then rejected San Antonio's contention that the State's delegation of its regulatory power to municipalities allowed the city to enforce safety-related requirements for tow trucks. *Id.* at 443-46. First, the court relied on the presumption that the omission of the "political subdivision" language indicated Congress' intent. *Id.* at 440-41. Furthermore, the court concluded that the statute in *Mortier* was "quite different" from Section 14501(c). The court also found that a contrary reading of Section 14501 would mean that Congress could never pre-empt local regulations while leaving intact a State's ability to regulate, which would lead to "an absurd result." *Stucky*, 260 F.3d at 443.

Fourth, the court determined that the legislative history behind the enactment of Section 14501(c) showed that Congress' purpose was to increase competition by eliminating local regulations. *Id.* at 444-46.

2. One Circuit and One State Appellate Court Have Held Section 14501(c) Does Not Pre-empt Cities from Enacting Safety Regulations for Tow Truck Operations.

Two appellate courts have found that Section 14501(c) does not pre-empt cities from enforcing safety regulations for tow trucks. The first court to do so was the Second Circuit, which held in 1999 that the section does not pre-empt such regulations. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999). The court based its decision on five grounds. Like the other four circuits, the court first recognized that the safety exemption did not specifically include political subdivisions. However, it decided that this was "no reason to construe" Section 14501(c)(2)(A) "to prevent the state from delegating *its* regulatory authority to a municipality." *Id.* at 775 (emphasis in original). In this case, the State of New York had delegated its regulatory authority to the City of New York. *Id.* at 776. Second, the court believed that the legislative history for the FAA Authorization Act indicated that state safety regulatory authority was to be "unaffected" by the pre-emption provision. *Id.* at 775. Third, the court concluded that the legislative history connected with Section 14501(c) suggest that its main purpose was to eliminate local economic regulation, not safety regulation. *Id.* at 776. Furthermore, the court relied on the presumption against pre-emption of States' regulations enacted under their police powers. *Id.* Fifth, the court deferred to the expertise of the U.S. Department of Transportation, which believes that Section 14501(c)(2)(A) exempts state and local safety regulations from pre-emption. *Id.*

Almost two years after *Ace*, the Court of Appeals for the First District of California followed it in ruling that Section 14501(c) does not pre-empt municipal safety regulation of tow

trucks. *See Servantes*, 103 Cal. Rptr. 2d 870. In that case, the City of San Francisco sued a towing company, asserting a claim for unfair business practices and seeking a permanent injunction, civil penalties, and a disgorgement of profits. After entering a preliminary injunction while the case was pending, the trial court entered judgment permanently enjoining the towing company from towing vehicles from private property and ordered the company to pay a civil penalty, to disgorge illegal profits, and to pay a fine for violating the preliminary injunction. The company appealed, arguing that Section 14501(c) pre-empted the city's ordinance. The court affirmed, justifying its decision on the pre-emption issue on three grounds. The court first based its ruling on the presumption against pre-emption of a state's regulations enacted under its police powers. *Id.* at 879-80. It then turned to the legislative history behind the FAA Authorization Act, and found no evidence of a Congressional desire to pre-empt local control over safety issues. *Id.* at 880. Third, the court concluded that Congress could have expressly declared that municipal regulation of safety issues was pre-empted, but failed to do so. *Id.*

3. Summary.

The split in the lower courts on this issue has ripened to the point where this Court must resolve it. This Court's primary charge, which is inscribed above the front doors of its building, is to ensure "equal justice under law." Equal justice under the law is being denied, however, when the validity of a safety-related towing ordinance depends on the location of the municipality enacting it rather than on its content. Furthermore, the validity of such an ordinance in California turns on whether the municipality is sued in state or federal court. This Court must remedy this intolerable situation.

B. The Question Presented Is Important and Recurring.

In addition to bringing a question that involves a mature division among the circuit courts, this petition concerns a significant and persistent issue to municipalities throughout the United States. Besides the six appellate courts listed in the

previous section of this petition and the lower courts involved in those cases and in this case, the City is aware of seven other courts that have confronted this pre-emption issue. *See Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801 (S.D. Tex. 2000); *Hott*, 92 F. Supp. 2d 996; *New Orleans Towing Ass'n v. City of New Orleans*, No. Civ. A. 99-3131, 2000 WL 193071 (E.D. La. Feb. 15, 2000); *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*, 78 F. Supp. 2d 725 (E.D. Tenn. 1999); *A. J.'s Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 WL 185521 (N.D. Tex. April 15, 1998); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996); *City of Cleveland v. Fox*, 761 N.E.2d 126 (Ohio Ct. App. 2001); *cf. Martin v. Stites*, 4 Fed. App. 621, 633, 2001 WL 121855, at *10-11 (10th Cir. Feb. 13, 2001) (unpublished) (Briscoe, C.J., concurring and dissenting) (urging remand to consider whether permit policy is saved by the safety exception), *cert. denied*, 122 S. Ct. 64 (2001).

Furthermore, the City knows of three courts that have considered whether Section 14501(c) pre-empts political subdivisions from enacting safety regulations regarding other commercial vehicles. *See California Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298 (E.D. Cal. 2001) (holding Section 14501(c) pre-empts state law authorizing municipal safety regulation of motor carriers); *Southern Blasting Servs., Inc. v. Wilkes County*, 162 F. Supp. 2d 455, 464-65 (W.D.N.C. 2001) (holding Section 14501(c) pre-empts state fire code authorizing county fire marshal to issue directive restricting vehicles transporting explosive materials); *City of Columbus v. Garrett*, No. 00AP-610, 2001 WL 289980 (Ohio Ct. App. March 27, 2001) (unpublished) (holding Section 14501(c) pre-empts municipal safety regulation of overweight and oversized vehicles), *appeal allowed*, 754 N.E.2d 262 (Ohio 2001), *dismissed*, 758 N.E.2d 182 (Ohio 2001).

The City likewise is aware of four decisions that have examined the scope of the safety exemption in Section 14501(c)

in other contexts. *See Pedus Sec. Servs. v. Con-Way W. Express, Inc.*, Nos. A092479, A093984, 2001 WL 1660036 (Cal. App. Dec. 28, 2001) (unpublished) (holding Section 14501(c) pre-empts common-law equitable indemnity action against motor carrier); *Espada v. Vehicle Removal Corp.*, No. 05-99-02140-CV, 2001 WL 996062 (Tex. App. – Dallas Aug. 31, 2001, pet. requested) (unpublished) (following *Whitten*); *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293 (Tex. App. – Dallas 2001, pet. requested) (holding Section 14501(c) pre-empts state towing statute authorizing private action for damages against towing company); *Horn v. A. J.'s Wrecker Serv., Inc.*, No. 05-99-01402-CV, 2000 WL 1184597 (Tex. App. – Dallas Aug. 22, 2000, no pet.) (unpublished) (holding Section 14501(c) pre-empts common-law negligence action and state deceptive trade practices statute authorizing private action for damages against towing company).

Additionally, to the best of the City's knowledge, many other municipalities have safety-related ordinances governing tow trucks. This is corroborated by the fact that three parties, including the International Municipal Lawyers Association, have filed amicus briefs in support of the *Ours Garage* petition. *See* Ct.'s Docket No. 01-419.

C. The Fifth Circuit Has Decided this Important Federal Question in a Way that Clearly Misapplies or Conflicts with Relevant Decisions of this Court.

1. The Fifth Circuit's Decision Clearly Misapplies *Medtronic*.

a. The Framework of Pre-emption Analysis.

The Supremacy Clause of the United States Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state laws are pre-empted where they conflict with a federal law, and they must yield to that law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

Federal law pre-empts state law under the Supremacy Clause when: (1) Congress defines explicitly the extent to which a federal statute pre-empts state law ("express preemption"); (2) the state law directly conflicts with the force or purpose of federal law ("conflict preemption"); or (3) the federal law occupies a legislative field to such an extent that it is reasonable to infer that Congress left no room for state regulation in that field ("field preemption"). *Cipollone*, 505 U.S. at 516. Although a municipal ordinance is at issue in this case rather than a state law, the constitutionality of a municipal ordinance for purposes of the Supremacy Clause is "analyzed in the same way as that of statewide laws." *Mortier*, 501 U.S. at 605.

Pre-emption " 'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (*quoting FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990)). On the other hand, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

Where a federal statute expressly pre-empts state or local law, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996) (citations omitted). The interpretation of the text is guided by two presumptions about the nature of pre-emption. First, a court should " 'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *Id.* at 485 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). This presumption is especially strong in areas such as health and safety measures. *English*, 496 U.S. at 79. This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

The second presumption is that Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Id.* (*quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Cipollone*, 505 U.S. at 516. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S at 485 (citation omitted). The "structure and purpose of the statute as a whole" may also be considered. *Id.* In addition, even with a clear expression of intent to pre-empt state and local regulation, a court must still determine the scope of pre-emption. *Id.*

b. The Fifth Circuit's Decision Clearly Misapplies Both *Medtronic* Presumptions.

i. Congress' Purpose When Enacting the Safety Exemption Was to Leave State Safety Authority Unaffected.

When Congress enacted the FAA Authorization Act, it contained both the pre-emption provision relied upon by Cole and the safety exemption relied upon by the City. *See* Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606 (1994). The legislative history of that Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulation, not local safety regulations:

> [P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

See H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 87, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (emphasis

added). Specifically, the legislative history indicates that Congress' purpose was to free the motor carrier industry from state and local economic regulation and to put that industry on a playing field level with that of the air carrier industry, which Congress had already deregulated by passing the Airline Deregulation Act of 1978. *See* H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. at 85, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1759. In so doing, Congress intended to eliminate the competitive advantage air carriers, like Federal Express, had enjoyed under decisions interpreting the 1978 statute, relative to motor carriers, such as United Parcel Service. *Id.*

By contrast, the conference report does not say that *state safety regulation* of motor carriers causes any problems even though it presumably is just as "diverse" as state economic regulation. In fact, there is no evidence or congressional findings that municipal safety regulations would interfere with Congress' concern for competitiveness in tow trucking. The legislative history of this Act indeed indicates that state safety regulatory authority (presumably including the authority to delegate) was to be "unaffected" by the pre-emption provision. *See* H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 43, 84, 85, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1757 ("State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected."); *see also id.* at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756 ("[N]othing in these new subsections contains a new grant of Federal authority to a State. . . . The intention of the conferees is solely to identify certain areas that are not preempted.").

ii. Congress' Intent When Enacting the Nonconsensual Rate Exemption Is Not Relevant When Determining Its Intent on the Safety Exemption.

One year after passing the FAA Authorization Act, Congress enacted the ICC Termination Act. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). This statute recodified the pre-emption

provision in its current form as a part of the ICA. This statute also added an exception to pre-emption that authorized States and political subdivisions to enforce laws relating to the price of a nonconsensual tow. *See* 109 Stat. at 899. The House report for the ICC Termination Act noted that the added exception to the pre-emption provision "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." *See* H.R. Rep. No. 311, 104th Cong., 1st Sess. 1, 120, *reprinted in* 1995 U.S.C.C.A.N. 793, 832. Accordingly, the provision was "not intended to permit re-regulation of any other aspect of tow truck operations." *Id.* at 119, *reprinted in* 1995 U.S.C.C.A.N. at 831.

The Fifth, Sixth, Ninth, and Eleventh Circuits relied on the comments of an individual legislator before the passage of the ICC Termination Act in 1995 and the Act's conference report as evidence that Congress intended that Act to prohibit cities from regulating tow trucks except for the rates for nonconsensual tows. *See Stucky*, 260 F.2d at 444 n.24 (statement of Rep. Rahall); *Petrey*, 246 F.3d at 563 (conference report); *Mayer*, 158 F.3d at 544-45 (conference report and statement of Rep. Rahall); *Toucher*, 219 F.3d at 1051 (relying on *Mayer*). The conference report and the comments are inapposite for at least two reasons. First, the conference report and the comments do not address the safety exception at issue in this case; instead, they were made in connection with the enactment of the "nonconsensual rate" exception to the pre-emption provision in the ICC Termination Act. Second, even if the comments were somehow applicable, they are post-enactment to the exception at issue here. Post-enactment statements are entitled to little weight. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967). The same is true for a post-enactment conference report because "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 89 (1996).

iii. Regulation of Tow Trucks Falls within the Historic Police Powers of the States.

The issue in this case implicates an important federalism concern.[4] When analyzing the scope of a federal pre-emption provision, this Court for years has recognized that the analysis starts with the assumption that the statute does not supersede the "historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485.

The Court has defined the police power "as the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). For years, courts have known that States and their cities may exercise their police power by regulating tow trucks to prevent traffic congestion and dangers incident thereto. *See, e.g., Librizzi v. Plunkett*, 16 A.2d 280, 281-82 (N.J. 1940); *Hempstead T–W. Corp. v. Town of Hempstead*, 177 N.Y.S.2d 445, 451-52 (N.Y. Sup. Ct. 1958), *aff'd*, 179 N.Y.S.2d 848 (N.Y. App. Div. 1958); *City of Chattanooga v. Fanberg*, 265 S.W.2d 15, 19-20 (Tenn. 1954); *City of Dallas v. Harris*, 157 S.W.2d 710, 711-12 (Tex. Civ. App. – Dallas 1941, writ ref'd); *cf. Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993) (noting "municipal regulation of the business of towing is not

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4. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 1041, 144, 162-66 (1992) (*citing Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)); *see also Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers").

unusual"). In *Fanberg*, the court specifically noted that States often delegate their power to regulate tow trucks to their cities:

> It seems to us clear under many authorities that the business of carrying or transporting property for hire is a privilege, the licensing, regulation and control of which is a legislative prerogative. This power to regulate the roads and streets is likewise a legislative prerogative and may be delegated by the Legislature of the State to the cities who in turn may by ordinance regulate control of the use and operation of wreckers or towing cars on its streets.

Id. at 19.

For decades, this Court also has recognized that States may regulate businesses that use streets:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

Stephenson v. Binford, 287 U.S. 251, 256 (1932). In fact, "[I]n no field has [this Court's] deference to state regulation been greater than that of highway safety regulation." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

Furthermore, this Court has known that States have traditionally re-delegated their regulatory authority to their cities. *Mortier*, 501 U.S. at 607-09. In this case, the Texas Legislature has expressly delegated its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a) (Vernon Supp. 2002). In turn, the City enacted the regulation at issue.[5]

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5. Cole has questioned whether Section 48A-13(a)(7)(A)(xiii) is a safety regulation. In *Ace*, tow truck companies challenged New York City's specific requirements regarding licensing, display of information, (Cont'd)

This Court has consistently regarded state regulations concerning public safety on streets and highways as innately local in nature and presumptively valid. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court's deference to the historic police power of the States and their cities is not only mandated by the Constitution, but also should result in the best protection of the public:

> The City Fathers of Chattanooga who enacted the Ordinance are presumed to be familiar with the local

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(Cont'd)

reporting, recordkeeping, criminal history, insurance, posting of bond, and maintenance of storage and repair facilities. The court found that "Most of these requirements are so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis is necessary to conclude that they fall within the 14501(c)(2)(A) exemptions." *Ace*, 171 F.2d at 776.

Similarly, the tow truck company in *Servantes* challenged San Francisco's specific requirements regarding licensing, reporting, and recordkeeping. The court held:

> [T]he San Francisco ordinances establishing licensing, reporting, recordkeeping, and other requirements for towing businesses are directly related to safety concerns and fall within the safety regulation exception. The permit scheme of the San Francisco Police Code serves to ensure that only qualified persons undertake nonconsensual tows. *The permit application process allows the police to check the background of permit applicants and to reject unsuitable persons, e.g., those with a history of vehicle offenses.*

Servantes, 103 Cal. Rptr. 2d at 880 (emphasis added).

Here, U.S. District Judge Fitzwater has previously found that Chapter 48A of the Dallas City Code was designed to address safety issues. *AJ's Wrecker*, 1998 WL 185521, at *3. When confronted by the same issue, Judge Lynn agreed with Judge Fitzwater. (App. D at 10a-11a.) It is reasonable to conclude that a person who has been confined for a drug offense may pose a risk to the public if he is behind the wheel of a tow truck because of the possibility that he may still be using or addicted to illegal drugs. A law should be upheld if any facts either known or reasonably assumed will support it. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). Furthermore, there is no evidence in the record that the requirement at issue is irrational.

> conditions and the necessity for the regulation of wreckers and towing cars. These legislative and administrative officials of the city are the ones who receive complaints about such things and they are the ones who are in a position to know what should be done to protect the public safety.

Fanberg, 265 S.W.2d at 20; *see also The Federalist* No. 17, at 107 (Alexander Hamilton) (J. Cooke ed. 1961); *The Federalist* No. 46, at 316 (James Madison) (J. Cooke ed. 1961).

Here, Congress did not prescribe how States were to assert their authority when it enacted the FAA Authorization Act. Congress knew, or should have known, however, that virtually all States delegate considerable police powers to their cities, including responsibility for the public's safety on streets and thoroughfares. Nonetheless, Congress, when promulgating the Act, did not explicitly prohibit cities from regulating the public-safety aspects of tow trucks.

Several state legislatures have examined Section 14501 and concluded that they may lawfully delegate their regulatory authority over tow trucks to some or all of their municipalities. *See, e.g.*, Cal. Veh. Code §§ 21100(g), 22850.5 (West 2001) (delegating State of California's regulatory authority over licensing and regulating the operation of tow truck service and tow truck drivers to its municipalities); La. Rev. Stat. § 32:1714(2) (West 2000) (delegating State of Louisiana's regulatory authority to its municipalities with a population of 450,000 or more); N.Y. Veh. & Traf. Law § 1642(a)(15) (McKinney 1996) (delegating New York State's regulatory authority to its municipalities with a population of more than one million); Tex. Transp. Code Ann. § 643.201(a) (delegating State of Texas' regulatory authority to its municipalities).

It practically goes without saying that one of the "first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state . . . law." *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (citation omitted). In this case, the Fifth Circuit did not presume that the

Texas statute delegating regulatory authority to cities was constitutional. Instead, the new pre-emption presumption proposed by the *Mayer*, *Tocher*, *Petrey*, and *Stucky* courts turns the *Medtronic* presumption on its head and would represent a significant intrusion into States' abilities to handle matters entrusted to them by Congress.[6]

iv. Summary.

As stated above, Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Medtronic*, 518 U.S. at 485. Here, the legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulation, not local safety regulations. Moreover, the legislative history of the ICC Termination Act is entitled to little, if any, weight *when interpreting the FAA Authorization Act*.

To the extent that the scope of Congress' purpose may be unclear, this Court should not construe the text of Section 14501 so as to frustrate unnecessarily the ability of cities to respond to the safety concerns created by local towing companies. Such deference to local responsibility and expertise would be consistent with the presumption against pre-emption of state and local regulations. *Id.*

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6. Courts have taken notice of the "great advantage" tow companies have over the owners of towed cars. *Servantes*, 103 Cal. Rptr. 2d at 872 (citing *Porter v. City of Atlanta*, 384 S.E.2d 631, 634 (Ga. 1989)). This advantage can lead to widespread abuses of the public. *Servantes*, 103 Cal. Rptr. 2d at 872-73, 878, 879.

Recognizing the dangers that these abuses may present to public safety as well as inherent dangers presented by tow trucks, the State of Texas has left much of the field of tow truck regulation to its municipalities, presumably believing that it could lawfully do so. If this Court were to hold that States cannot delegate such authority, then it would hamper them in their efforts to protect public safety. This is not sound public policy. *See Ace*, 171 F.2d at 776 (finding its holding consistent with public policy).

2. The Fifth Circuit's Decision Clearly Conflicts with *Mortier*.

On its face, Section 14501(c)(2)(A) excepts only "State" regulatory authority concerning safety and insurance.[7] "The term 'State' means the 50 States of the United States and the District of Columbia" for purposes of this statute. 49 U.S.C. § 13102(18). By contrast, Section 14501(c)(2)(C) allows a State and its political subdivisions to regulate the prices of nonconsensual tows.

Although Subsection (c)(2)(A) expressly refers only to "State" regulatory authority, that does not mean that this subsection does not also allow municipal regulation. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), although explicitly permitting only "a State" to regulate pesticides subject to certain federal restrictions, and defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa," does not limit a State's power to redelegate its authority to a political subdivision. *Mortier*, 501 U.S. at 607-09, 611-12.

The statute at issue in *Mortier* provided:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v. Nonetheless, this Court found the language of Sections 136(aa) and 136v to be "wholly inadequate to convey an express preemptive intent." *Mortier*, 501 U.S. at 607. "Mere silence" would not "suffice to establish 'a clear and manifest

7. Even though Congress failed to mention municipal safety regulation in this section, it did not explicitly pre-empt municipal safety regulation. Had Congress intended not to except municipal safety regulations, Congress could have said so.

purpose' to pre-empt local authority." *Id.* (citation omitted); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (pre-emption of regulation enacted pursuant to police power will not occur "in the absence of an unambiguous congressional mandate to that effect"). The Court also observed that it is well established that units of local government are created to exercise such powers as a State may entrust to them in its absolute discretion. *Mortier*, 501 U.S. at 607-08. Consequently, "the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because *political subdivisions are components of the very entity the statute empowers*."[8] *Id.* at 608 (emphasis added). In other

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8. The City is an integral component of the State of Texas. Municipal ordinances *are* state law and are prosecuted "In the name and by the authority of the State of Texas." Tex. Code Crim. Proc. Ann. art. 45.019 (Vernon Supp. 2002); *see also* Tex. Code Crim. Proc. Ann. art. 45.201 (Vernon Supp. 2002) (authorizing city attorney to represent the State in prosecutions in municipal courts). Moreover, under the Texas Constitution, the City is a home-rule municipality. *See* Special Act of April 13, 1907, 30th Leg., 1st C.S., ch. 71, 1907 Tex. Spec. Laws 568; Tex. Const. art. XI, § 5; *see also Dallas Merchants & Concessionaires Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). The Texas Local Government Code provides that a home-rule municipality has the full power of local self-government. Tex. Loc. Gov't Code Ann. § 51.072 (Vernon 1999). Accordingly, "[h]ome-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchants*, 852 S.W.2d at 490-91.

"Cities occupy an important place in our system of government. In many instances they have been created as arms of the State government, with authority to help protect and maintain the general welfare of the public." *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 288 (Tex. 1950). When a home-rule city conducts a governmental activity or function, it is operating as an arm or agent of the State. *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949).

In this case, the regulation of tow trucks is beyond doubt a governmental function. The Texas Legislature has expressly delegated

(Cont'd)

words, the term "State" is not "self-limiting." *Mortier*, 501 U.S. at 612. To the contrary, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the '*absolute discretion*' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608 (emphasis added). Thus, the express delegation of regulatory authority to a State may well mean that it is permitted to redelegate its authority to a "political subdivision[ ] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Id.* at 612.[9]

(Cont'd)

its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a). Furthermore, the Texas Tort Claims Act recognizes "regulation of traffic" and "parking facilities" as governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(11), (25) (Vernon Supp. 2002); *see also Town of Ascarate v. Villalobos*, 213 S.W.2d 945, 950 (Tex. 1949) ("A municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public, and in the exercise of its police power to protect the public from traffic hazards").

9. Since 1991, several lower courts have applied *Mortier* to hold that federal statutes allowing a "State" to regulate also authorize its political subdivisions to do so. *See Fireman's Fund Ins. Co. v. Lodi*, 271 F.3d 911, 932-36 (9th Cir. 2001) (holding that the term "State" in pre-emption provisions in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, do not prohibit municipalities from enacting hazardous waste regulations); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (holding that pre-emption provision of Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*, does not prohibit States from re-delegating their powers under the Act); *Coparr, Ltd. v. City of Boulder*, 942 F.2d 724, 726 (10th Cir. 1991) (holding that FIFRA does not prohibit States from authorizing municipalities to impose notification requirements concerning pesticide use on private individuals, property owners, and the general

(Cont'd)

Other regulatory exceptions listed in Subsection (c)(2)(A) confirm the conclusion that Congress' use of the term "a State" is not limiting. For example, the exception allowing "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo" refers to the HMTA Act. *See* 49 U.S.C. §§ 5101-5127. The HMTA Act's structure clearly allows a municipality to exercise authority over the routing of hazardous materials shipments by a motor carrier if it complies with the standards prescribed by the Act and the Secretary of Transportation. *See* 49 U.S.C. §§ 5112, 5125; *see also Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112-13 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986);

(Cont'd)

public); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) (holding that Telecommunications Act of 1996 does not prohibit States from re-delegating their powers under the Act); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939-40 (W.D. Tex. 1997) (citing *Mortier* for proposition that "State's authority to regulate under a federal statute necessarily includes the authority to delegate local regulation, including regulation for public health, safety, and welfare purposes, to local authorities"); *cf. Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that the term "State" in pre-emption provision of Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, does not prohibit cities from enacting laws to protect public from asbestos removal); *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159-60 (Cal. 1984) (holding FIFRA does not preclude States from authorizing local governments to enact restrictive pesticide regulations); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 200-01 (N.Y. Sup. Ct. 1994) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program, 10 U.S.C. §§ 4307-4311, *repealed by* Defense Authorization Act of 1996, P.L. 104-106, § 1624, 110 Stat. 186, 522 (1996), did not pre-empt city ordinance which restricted possession of automatic and semiautomatic weapons); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program did not pre-empt city ordinance prohibiting possession and sale of "assault weapons").

City of New York v. United States Dep't of Transp., 715 F.2d 732 (2d Cir. 1983), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984); *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

Notwithstanding this weight of authority, the Fifth, Sixth, and Eleventh Circuits all explicitly refused to apply *Mortier* to this case. *Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47.

D. The Second Circuit's Decision Does Not Conflict with *BFP* and *Russello*.

In response to the clear command of *Mortier*, the Fifth Circuit as well as the Sixth, Ninth and Eleventh Circuits followed "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Stucky*, 260 F.3d at 440-41 (relying on *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Petrey*, 246 F.3d at 561 (relying on *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) and *Russello*); *Toucher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 545 (relying on *BFP* and *Russello*). This is simply another way of stating the maxim "*expressio unius est exclusio alterius*," which means "the expression of one thing is the exclusion of another."

This maxim should not be applied when analyzing the FAA Authorization Act for several reasons. First, *Russello* itself counsels that this presumption has force only if the two provisions in question are included within the same legislative enactment: " '[W]here Congress includes particular language in one section of a statute but omits it in *another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello*, 464 U.S. At 23 (citation omitted; brackets original; emphasis added). Here, the two exceptions to pre-emption were passed in two different Acts.

Second, this maxim should not applied to exclude agents of an enumerated party. Seven years before *Mortier*, the

California Supreme Court examined whether FIFRA, a statute that authorized "State" regulation of pesticides, precluded States from authorizing local governments to enact such regulations. *See County of Mendocino*, 683 P.2d 1150. Some plaintiffs relied upon this maxim, claiming that the reference to "State" should be read as excluding local governmental regulation. That court rejected the application of the maxim for two reasons:

> Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Id. at 1160.

Third, this maxim is only an aid to statutory construction and not a rule of law. *United States v. Castro*, 837 F.2d 441, 443 n.2 (11th Cir. 1988). Accordingly, the maxim should be used with care. *See Castro*, 837 F.2d at 443 n.2. In 1927, this Court quoted Lord Justice Lopes' warning about the maxim:

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Ford v. United States, 273 U.S. 593, 611-12 (1927).

On several occasions, the Supreme Court has stated that the maxim is subordinate to legislative intent or policy. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("However well these rules may serve at times to aid in deciphering legislative

intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."); *Ford*, 273 U.S. at 611; *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 15 (1904).

Here, the legislative history of the FAA Authorization Act shows that Congress' purpose was to eliminate disparate *economic* regulation, not local safety laws. Furthermore, the legislative history of the ICC Termination Act is entitled to little, if any, weight.

CONCLUSION

The petition should be granted and it should be consolidated with *Ours Garage*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 9, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-10194
Summary Calendar

PETER T. COLE

Plaintiff-Appellant

v.

CITY OF DALLAS

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CV-1723-M

Before KING, Chief Judge, and HIGGINBOTHAM and BENAVIDES, Circuit Judges.

PER CURIAM:*

Peter T. Cole appeals the district court's denial of his civil rights complaint in which he requested injunctive and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

declaratory relief, damages, attorneys' fees, and costs. The City of Dallas (City) denied Cole's request for a wrecker driver's permit pursuant to chapter 48A-13 (a) (7) (A) (xiii), which prohibits the issuance of a wrecker driver's permit to a person who has been convicted of a crime involving a violation of the Controlled Substances Act, or a comparable state or federal law, that is punishable as a felony for which less than five years have elapsed since the date of conviction or the date of confinement for the last conviction, whichever is the later date. The district court concluded that chapter 48A of the Dallas city code, which regulates the towing services industry in Dallas, has not been preempted by 49 U.S.C. § 14501(c). Cole argues that 49 U.S.C. § 14501(c) preempts chapter 48A and that the safety exemption of § 14501 (c) (2) does not apply to municipalities.

In a supplemental letter brief filed after our decision in *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), the City of Dallas states that "[a]s [chapter] 48A-13 (a) (7) (A) (xiii) is a motor vehicle safety regulation, the City acknowledges that *Stucky* prohibits a city from enacting or enforcing such a law." The City then puts forward several arguments for the reconsideration of *Stucky*. Only the en banc court can reconsider *Stucky*. We are bound by it. The City's concession decides this case. Accordingly, the district court's judgment is VACATED, and the case is REMANDED to the district court for further consideration consistent with this opinion.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED JANUARY 11, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:00-CV-1723-M

PETER T. COLE,

Plaintiff,

v.

CITY OF DALLAS,

Defendant.

FINAL JUDGMENT

1. On August 9, 2000, the Court heard Plaintiff's application for preliminary injunction. Plaintiff, Peter T. Cole ("Cole"), appeared through his attorney and announced ready and made argument. Defendant, City of Dallas, appeared through its attorney and announced ready and made argument. The Court determined that it had jurisdiction over the subject matter and the parties to this proceeding.

2. There was no right to a jury trial on the issues before the Court.

Appendix B

3. The Court heard the evidence and arguments of counsel.

4. The Court made written findings of fact and conclusions of law in its Memorandum Opinion and Order, dated August 23, 2000.

5. The parties entered into stipulations of fact, filed on January 9, 2001.

Findings of Fact

6. The Court makes the following findings of fact:

   a. Dallas City Code Chapter 48A requires a tow truck driver to obtain a special driver's permit issued by the City of Dallas ("a wrecker driver's permit").

   b. Plaintiff was denied such a permit when he requested it from the City of Dallas, solely because the Dallas City Code prohibits issuance of a wrecker driver's permit to a person convicted of an offense related to a delivery of a controlled substance who was recently released from prison, as was Plaintiff.

   c. Dallas City Code Chapter 48A relates to price, route and/or service of towing companies.

   d. Dallas City Code Chapter 48A is a law enacted to protect the public interest.

e. Dallas City Code Chapter 48A is a law which the City of Dallas administers in a manner that protects the public health and safety and promotes public convenience and necessity.

Conclusions of Law

7. The Court makes the following conclusions of law:

a. Dallas City Code 48A relates to price, route and/or service.

b. Dallas City Code 48A is a regulation to protect the public health and safety.

c. Dallas City Code 48A is a motor vehicle safety regulation and is not preempted by 49 U.S.C. § 14501(c).

d. State regulation of motor vehicle safety is expressly exempted from preemption by 49 U.S.C. § 14501(c)(2)(A).

e. The State of Texas is permitted by 49 U.S.C. § 14501(c) to delegate its regulatory authority under 49 U.S.C. § 14501(c) to a political subdivision of the State.

f. By virtue of the State's redelegation to the City of Dallas ("the City"), the City is permitted by 49 U.S.C. § 14501(c)(2)(A) to regulate motor vehicle safety.

g. The City's determination under Dallas City Code Chapter 48A of whether to issue a wrecker driver's permit in consideration of the applicant's criminal history under § 48A is a regulation regulating motor vehicle safety.

8. Based on these findings of fact and conclusions of law, the Court orders that Plaintiff, Peter T. Cole, take nothing by his suit.

9. The Court denies all relief not granted in this judgment.

10. This is a FINAL JUDGMENT.

SO ORDERED.
January 11, 2001.

s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED AUGUST 23, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:00-CV-1723-M

PETER T. COLE,

Plaintiff,

v.

CITY OF DALLAS,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Peter T. Cole ("Cole") sues Defendant, the City of Dallas ("the City"), for declaratory and injunctive relief with respect to certain towing regulations. Cole sought a Temporary Restraining Order ("TRO") and a preliminary injunction to prevent the City from enforcing Chapter 48A of the Dallas City Code, which regulates the service, routes, and pricing of towing companies operating within the City. Prior to removal, the state court granted a TRO, which lapsed on its own terms. Plaintiff's application for a preliminary injunction is currently before the Court, and oral argument was heard on August 9, 2000.

Appendix C

Having considered the record and the applicable law, for the reasons stated below, the Court holds that Plaintiff fails to demonstrate a substantial likelihood of success on the merits, and denies the preliminary injunction.

I. Analysis and Decision

To obtain a preliminary injunction, Plaintiff must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury outweighs any damage the injunction might cause to the defendant; and (4) that the injunction does not disserve the public interest. *Canal Auth. of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). The burden of establishing these four requirements is a heavy one because the granting of such a remedy constitutes extraordinary relief. *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

Plaintiff challenges the enforcement of Chapter 48A of the Dallas City Code, claiming it violates the Interstate Commerce Act, 49 U.S.C. § 14501(c).[1] Specifically, Chapter

1. Section 14501(c)(1) expressly prohibits a state or a political subdivision thereof from "enact[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1) (1997).

48A-12 requires the issuance by the City of a special driver's permit when the driver is to provide towing services within the City. Plaintiff, who was denied such a permit, argues that Chapter 48A is preempted by § 14501(c), and asks for injunctive relief, claiming he has lost the opportunity to make a living as a tow truck driver within the City.

It is clear that, on its face, Chapter 48A is preempted by § 14501(c), since it relates to price, route and/or service of a motor carrier. However, a statutory exception to § 14501(c) preemption is prescribed under § 14501(c)(2)(A), for the "safety regulatory authority of a State with respect to motor vehicles." In other words, regulations related to motor vehicle safety are expressly exempted from preemption by 49 U.S.C. § 14501(c)(2)(A)[2] *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 991 F. Supp. 573, 576 (N.D. Tex. 1998), *affirmed* 180 F.3d 686 (5th Cir. 1999). However, Plaintiff argues that such exception applies only to regulations promulgated by the State of Texas, not by the City of Dallas. The Court disagrees with this interpretation.

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2. Specifically, § 14501(c)(2) states that Paragraph 1 (preemption):

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls, or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self insurance authorization.

Appendix C

The State of Texas is permitted to redelegate its authority to a "political subdivision[] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 (1991). *See also AJ's Wrecker Service, Inc. v. City of Dallas*, 1998 WL 185521, *3 (N.D. Tex. Apr. 15, 1998) (holding that State could redelegate its authority to the City of Dallas to enact safety regulations). Here, the State of Texas has enacted legislation that grants municipalities the right to "regulate the operation of a tow truck to the extent allowed by federal law." TEX. TRANSP. CODE ANN. § 643.201(a) (Vernon 1996). Therefore, Section 14501(c)(2)(A) preserves the City's authority to regulate motor safety.[3] *AJ's Wrecker* at 3.

Next Plaintiff contends that the regulations at issue do not fall with the statutory exception for "safety" regulation. Specifically, he argues that the term "safety," as used in the statute, speaks only to the safety of the motor vehicle itself. According to Cole, since Chapter 48A has nothing to do with the safety of motor vehicles, but rather regulates the drivers of such vehicles, it does not fall into the prescribed exception.

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3. Currently, there is a split between the Second and Eleventh Circuits on this precise issue. *See Ace Auto Body & Towing, Ltd. v. New York*, 171 F.3d 765, 777 (2ND Cir.), *cert. denied*, 120 S.Ct. 166 (1999) (state can delegate regulatory authority to municipality, thus shielding city's regulation from preemption); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1334 (1999) (state cannot delegate authority to city). The Fifth Circuit has not addressed whether the preemption exemption for safety regulations can be invoked by municipalities.

Appendix C

This Court concludes, as has Judge Sidney Fitzwater in a similar case in this district, that Chapter 48A is designed to address safety issues, and that it should not be so narrowly construed as Plaintiff urges. *See AJ's Wrecker* at 3. The stated policy of Chapter 48A is to protect the public interest, as it relates to private non-consensual tows, through regulations administered in a manner that protects the public health and safety and promotes public convenience and necessity. Additionally, the City ordinance that amended Chapter 48A delineates several safety concerns underlying Chapter 48A regulations.[4] As was the case in *AJ's Wrecker*, Plaintiff has failed to introduce any evidence that the City promulgated the challenged regulation for any reason other than public safety.

Because this Court concludes that Chapter 48A probably falls within the safety regulation exception of § 14501(c)(2)(A), and is thus not preempted, the Court holds that Cole has failed to demonstrate a likelihood of success

4. In passing the ordinance, the City Council noted that such regulations promote the public safety of both visitors and residents of the City by contributing to a decrease in the potential for confrontation and violence between vehicle owners and tow truck drivers; a decrease in bodily injury and property damage caused by faulty tow truck vehicles and equipment by incompetent, negligent, and criminal actions of tow truck operators and drivers; a decrease in the number of false auto theft reports processed by the police department, allowing the police to devote more time to respond to more critical public safety situations; and a decrease in auto theft incidences and an increase in the recovery of stolen autos by allowing the police to more quickly and efficiently determine when a car has been stolen, rather than towed, and take appropriate action. *See* Chapter 48A of the Dallas City Code.

on the merits of his claim. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 991 F.Supp. 573, 576 (N.D. Tex. Jan. 9, 1998) (city towing contract for emergency wrecker service and related ordinance fell within safety exception because "(t]here is no doubt that the Ordinance and Contract have a safety purpose"); *Ace Body & Towing, Ltd. v. City of New York*, 1997 WL 221261, at *3 (S.D.N.Y. Apr. 28,1997) (preliminary injunction denied since plaintiffs were not likely to succeed on the merits since it is "likely that the challenged regulations (governing emergency wrecker service] fall within the safety regulation exception of Section 14501(c)(2)(A)"); *AJ's Wrecker* at *4 (preliminary injunction denied since plaintiffs would likely not succeed on the merits because Chapter 48A of the Dallas City Code is probably a proper safety regulation and not preempted). Accordingly, Plaintiff's application for a preliminary injunction is denied.

II. Conclusion

The Court need not reach the other elements of the test for the issuance of a preliminary injunction since Plaintiff has failed to demonstrate a substantial likelihood of success on the merits. The Court denies Plaintiff's request for a preliminary injunction.

SO ORDERED.

August 23, 2000.

s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

APPENDIX D — CITY OF DALLAS ORDINANCE NO. 24175

ORDINANCE NO. 24175

An ordinance repealing and reenacting CHAPTER 48A, "VEHICLE TOW SERVICE," of the Dallas City Code, as amended; defining terms; providing regulations and requirements for a vehicle tow service; deleting a requirement that a vehicle tow service have a written agreement with each vehicle storage facility it uses; allowing vehicle tow service licensees to subcontract with each other to provide vehicle tow service in the city; requiring the director to issue or deny a vehicle tow service license within 30 days after receiving an application; deleting a requirement that a wrecker driver be examined on traffic laws and city geography; providing that an applicant for a wrecker driver's permit may receive copies of everything in his or her file to the extent allowed under the Public Information Act; extending the time in which an appeal may be filed for certain suspensions of a wrecker driver's permit; requiring that, on and after February 1, 2001, additional tow signs be posted on the interior of private property to provide towing information in Spanish and to provide information relating to tow charges and complaints; increasing the maximum fees that may be charged for vehicle tow service; providing weight and equipment requirements for wreckers; making certain semantic, grammatical, and structural changes; providing a penalty of not less than $200 nor more than $500; providing a severability clause; and providing an effective date.

WHEREAS, 49 U.S.C. § 14501(c) prohibits enforcement of state and local towing regulations relating to price, route, or service, with certain exceptions; and

Appendix D

WHEREAS, those exceptions allow a state to impose safety-related regulations and minimum insurance requirements on tow trucks and allow state and local regulation of the price of nonconsensual tows; and

WHEREAS, court decisions have held that a municipality, as a political subdivision and governmental unit of a state, may exercise any powers granted to the state that the state may wish to redelegate to its municipalities; and

WHEREAS, in Chapter 684 of the Texas Transportation Code, the State of Texas has delegated to its municipalities some of its power to regulate tow services, which powers are granted to the State of Texas by the 49 U.S.C. § 14501(c) exceptions; and

WHEREAS, the city council finds that the city of Dallas may impose safety-related regulations and minimum insurance requirements on tow trucks, in addition to regulating the price of nonconsensual tows, in the same manner as the State of Texas; and

WHEREAS, the city council finds that the proposed regulations governing persons performing nonconsensual tows from private property, which regulations include, but are not limited to, licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements, are all safety-related or otherwise fall within the 49 U.S.C. § 14501(c) exceptions; and

WHEREAS, the city council believes that the proposed safety-related regulations for nonconsensual tows would

promote the public safety of both visitors and residents of the city of Dallas by contributing to a decrease in the potential for confrontation and violence between vehicle owners and the persons who tow their vehicles; a decrease in bodily injury and property damage caused by faulty tow truck vehicles and equipment or by incompetent, negligent, and criminal actions of tow truck operators and drivers; a decrease in the number of false auto theft reports processed by the police department, thereby allowing the police to devote more time to responding to more critical public safety situations; and a decrease in auto theft incidences and an increase in the recovery of stolen autos by allowing the police to more quickly and efficiently determine when a car has been stolen, rather than towed, and take appropriate action; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That CHAPTER 48A, "VEHICLE TOW SERVICE," of the Dallas City Code, as amended, is repealed and reenacted to read as follows:

Appendix D

CHAPTER 48A

VEHICLE TOW SERVICE

ARTICLE I.

GENERAL PROVISIONS.

SEC. 48A-1. STATEMENT OF POLICY

It is the policy of the city to provide for the protection of the public interest as it relates to the parking of vehicles on private property and to the removal of those vehicles to vehicle storage facilities without the consent of the vehicle owners or operators. To this end, this chapter provides for the regulation of vehicle tow service, to be administered in a manner that protects the public health and safety and promotes the public convenience and necessity.

* * *

ARTICLE III.

WRECKER DRIVER'S PERMIT.

SEC. 48A-12. WRECKER DRIVER'S PERMIT REQUIRED.

(a) A person commits an offense if he operates a wrecker engaged in vehicle tow service in the city without a valid wrecker driver's permit issued to the person under this article.

(b) A licensee commits an offense if he employs or otherwise allows a person to operate for compensation a wrecker owned, controlled, or operated by the licensee unless the person has a valid wrecker driver's permit issued under this article.

SEC. 48A-13. QUALIFICATIONS FOR A WRECKER DRIVER'S PERMIT.

(a) To qualify for a wrecker driver's permit, an applicant must:

* * *

(7) not have been convicted of a crime:

(A) involving

* * *

(xiii) a violation of the Controlled Substances Act (Article 4476-15. Vernon's Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law;

* * *

(B) for which:

* * *

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense.

* * *

SEC 48A-16. ISSUANCE AND DENIAL OF WRECKER DRIVER'S PERMIT.

(a) The director shall issue a wrecker driver's permit to an applicant, unless the director determines that the applicant is not qualified.

* * *

(c) The director shall deny the application for a wrecker driver's permit if the applicant:

(1) is not qualified under Section 48A-13:

* * *

SECTION 2. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

* * *

Passed JAN 26 2000
LC/DCC/00189a

APPENDIX E — RELEVANT STATUTE AND CODE INVOLVED

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of a for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

* * *

TEX. TRANSP. CODE

SUBCHAPTER E. TOW TRUCKS

§ 643.201. Tow Truck Regulation by Political Subdivisions

(a) In addition to the registration requirements of Subchapter B, a political subdivision of this state may regulate the operation of a tow truck to the extent allowed by federal law.

* * *